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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Expedited Declaratory Ruling	)	
Regarding the Process for Adoption of	)	CC Docket No. 00-45
Agreements Pursuant to Section 252(i) of	)	
the Communications Act and Section 51.809	)	
of the Commission's Rules	)	
	)	

COMMENTS OF SBC COMMUNICATIONS INC.

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I. INTRODUCTION AND SUMMARY

Pursuant to the Public Notice issued March 16, 2000,[1] SBC Communications, Inc, (SBC) respectfully submits the following comments on MCI WorldCom's petition for declaratory ruling in the above-captioned matter. In its petition, MCI asks the Commission to declare that:

(i) a requesting carrier's right to adopt a previously approved interconnection agreement is not subject to state commission approval;

(ii) a requesting carrier's adoption is effective on the date of notice of adoption to the incumbent local exchange carrier (ILEC);

(iii) an ILEC may be excused from complying with the adopted terms only if it proves that: (a) the cost of providing interconnection to the requesting carrier is greater than the costs of providing it to the carrier that originally negotiated the agreement; (b) the proposed adoption is technically infeasible; or, (c) in the "pick and choose' context, that the carrier has failed to adopt legitimately related terms and conditions;

(iv) if an ILEC fails to sustain the burden of proof, described above, the effective date of the agreement is retroactive to the date of the notice of adoption;

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[1] Pleading cycle Established for Comments on the Revised Petition of MCI WorldCom, Inc. for Declaratory Ruling Regarding the Process for Adoption of Agreements Pursuant to Section 251(i) of the Communications Act and Section 51.809 of the Commission's Rules, DA 00-592, released March 16, 2000.

(v) states must address any ILEC claims regarding increased cost, technical infeasibility, or legitimately related terms on an expedited basis; and

(vi) during the pendency of such claims, an ILEC must honor the adoption of terms other than those being challenged.

MCI also asks the Commission to hold in abeyance, pending resolution of its petition, a complaint it filed last year against each of the Ameritech operating companies which presented the same legal issues that MCI now re-raises in its petition.[2]

SBC brings a unique perspective to this proceeding. Although SBC's operating companies are, of course, incumbent LECs, SBC has committed, at the risk of stiff penalties, to enter 30 out-of-region markets in the next two years.[3] Moreover, for business reasons, it has decided to accelerate that already-ambitious schedule. To date, it has availed itself of the section 252(i) process in nine markets, and it will undoubtedly continue to rely on that process as it enters other markets. Thus SBC has a vested interest in ensuring the integrity of the section 252(i) process, and, in particular, that this process does not unreasonably delay market entry. That being said, for the many reasons discussed below, SBC cannot support the declaratory ruling sought by MCI.

To begin with, MCI's Petition makes a mockery of the Commission's rules of practice and procedure. As MCI itself notes, the substantive legal issues raised in MCI's petition were previously raised by MCI in a formal complaint against Ameritech.[4] Those

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[2] MCI Petition at 2.

[3] *See Applications of Ameritech Corp. and SBC Communications, Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules,* CC Docket No. 88-141, FCC 99-279, released October 8, 1999, Appendix C at 60.

[4] MCI WorldCom Communications, Inc. v. Illinois Bell Telephone Company, d/b/a Ameritech Illinois; Indiana Bell Telephone Company, d/b/a Ameritech Indiana; Michigan Bell Telephone Company, d/b/a Ameritech Michigan; The Ohio Bell Telephone Company, d/b/a Ameritech Ohio; and Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin, File No. E-99-23.

issues have been briefed and are ripe for decision. MCI has no right to rebrief these very same issues through the artifice of a petition for declaratory ruling.[5] Nor can it deny Ameritech its right to a timely decision in that proceeding while MCI avails itself of this "second bite out of the apple." Indeed, the fact that MCI neither served its declaratory ruling request on Ameritech, nor filed a copy of that petition in the complaint docket, even though that petition asks the Commission to suspend consideration of the complaint, only underscores the extent to which MCI place itself above the law.

SBC's opposition to MCI's petition, though, is based on more than MCI's disregard for the most basic rules of practice and procedure. The petition also is deficient on substantive grounds.

First, although SBC would agree that different states have taken different approaches to the section 252(i) process – some more streamlined than others – MCI grossly exaggerates when it claims that these varying approaches have had a significant

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[5] In effect, MCI asks the Commission to ignore the briefs that were filed in the complaint docket by resolving the legal issues addressed in those briefs in the context of this declaratory ruling. On March 30, 2000, MCI sent a letter to Glenn Reynolds of the Enforcement Bureau which purports to demonstrate that this ploy is consistent with Commission precedent. It points to two items – an order and public notice - in support of this claim. Neither of these items, however, is even close to being on point. The order cited by MCI – *Complaint of Liberty Cable Company, Inc., v. Courtroom Television Network,* 9 FCC Rcd 4035 (1994) – is actually *contrary* to its argument. That case involved a Commission decision to hold a complaint in abeyance while a proceeding involving critically related issues that had been initiated prior to the filing of the complaint was resolved. The Commission reasoned that, since the legal issues raised by the complaint were already being considered in the previously initiated proceeding, it would be a waste of administrative resources to go through the same process in the context of the complaint. Thus, if anything, this case suggests that the Commission should have deferred action on MCI's petition for declaratory ruling pending resolution of its complaint. It in no way supports deferring action on the complaint while the Commission wastes administrative and private resources seeking new briefs on issues that already were briefed and are ripe for decision. The public notice MCI cites (DA 97-1062, released May 21, 1997) is no more helpful. In that notice, the Commission seeks public comment on a petition for declaratory ruling filed by MCI, even though a complaint involving some of the issues raised in MCI's petition had previously been filed by Ameritech. Quite obviously, in seeking comment on this petition, the Commission in no way suggested that it would be appropriate for *one party* to initiate both a complaint and a declaratory ruling.

impact in the marketplace. To be sure, SBC itself prefers a streamlined approach, but MCI's suggestion that "the panoply of state procedures for the adoption of already approved agreements is an inherent deterrent to healthy competition," or that "the entropic procedures [delay or even] prohibit CLECs from market entry," is wildly overstated."[6] Indeed, while MCI's petition is long on rhetoric, it is noticeably short on substance. It provides only the most cursory description of a handful of state processes, and even those descriptions are, in some cases, misleading or inaccurate.[7] Nor does it provide any evidence that these processes actually are having the deleterious effects in the market that it claims. In fact, the only evidence it offers in this regard are its references to the adoption notices that led to its complaint against Ameritech. But in those cases, it was not the state processes that caused unreasonable delay; it was MCI's decision to challenge those processes rather than follow them. The fact of the matter is that SBC and its affiliates have been parties to literally hundreds of adoptions, the vast majority of which have been completed within 60 days.

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[6] MCI Petition at 10.

[7] For example, while MCI notes that Ohio requires regulatory approval for all opt-in arrangements, it fails to point out that the Public Utilities Commission of Ohio permits section 252(i) agreements to take effect when filed, subject to a post-filing review process. *See* MCI WorldCom's and Ameritech's Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. E-99-23. MCI also claims that the Indiana Utility Regulatory Commission is "far from settled" and that the IURC has established a thirty-day comment cycle on adoption requests. In fact, the processes are quite settled, and the IURC requires that objections be filed within 20 days, not 30 days. *See* Attachment A. MCI states further that the time period for an adoption is not established in Kansas, but, in fact, the State Corporation Commission of Kansas has ruled that, absent any objection, a signed interconnection agreement must be submitted to that Commission within 3 weeks of the requested adoption and that "the Commission shall issue an order approving the election within two weeks of the date of filing." *Petition of Southwestern Bell Telephone company for Arbitration of Unresolved Interconnection issues with Brooks Fiber Communications of Missouri, Inc., pursuant to §252(b) of the Telecommunications Act of 1996,* Order on Reconsideration, Docket No. 00-SWBT-250-ARB (Kansas 2000).

More importantly, irrespective of whether the section 252(i) process actually needs fixing, the Commission cannot adopt the "fix" that MCI has proposed. Although MCI posits its petition as a declaratory ruling – *i.e,* a clarification of *existing* law - what MCI actually proposes is a significant *change* of law. For example, while MCI claims that section 51.809(a) requires that adoption requests be given "immediate" effect, section 51.809(a) says nothing of the sort. It states that section 252(i) adoptions must be implemented "without unreasonable delay." The term "without unreasonable delay" does not mean "immediately." Undoubtedly, that is why MCI repeatedly *misquotes* section 51.809(a) in its petition - omitting the word "unreasonable" every time it references that provision.[8]

Nor did the Commission limit the states to "ministerial rules" governing the *filing* of adopted agreements, as MCI claims. To the contrary, the Commission gave the states broader authority, authorizing them to establish "the details of the procedures for making agreements available to requesting carriers on an expedited basis."[9]

For these reasons alone, MCI's requested declaratory ruling must be rejected. The Commission cannot change its rules in a declaratory ruling. But these are not the only respects in which MCI's proposal is inconsistent with existing law. The proposal offered by MCI deviates from the law in at least three other respects.

First, MCI's proposal is inconsistent with the contract-based regime established in section 251/252 of the 1996 Act. Under MCI's proposal, interconnection rights could be invoked unilaterally through the act of sending a notice of adoption. But the rights set forth in section 251 of the 1996 Act are not self-executing; they are conferred only

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[8] This mis-quote is no accident. In its filings in the Ameritech complaint proceeding, MCI repeatedly misquoted this same rule – omitting, as it does here, the word "unreasonable." *See, e.g.,* Ameritech and MCI Replies, filed October 8, 1999, E-99-23.

[9] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499 (1996) (*Local Competition Order*) at para. 1321.

through an interconnection agreement adopted pursuant to section 252. Thus, for example, just as an arbitration order does not, in and of itself, displace the need for an interconnection agreement, neither does section 252(i) . Rather, like an arbitration decision, section 252(i) simply establishes substantive rights that may be incorporated into an interconnection agreement. Indeed, since in order to effect an adoption, conforming changes must always be made to the underlying agreement – for example, to establish new points and/or dates of interconnection, notice information, etc. – a new agreement must necessarily be executed so that the rights and obligations of the parties are stated accurately. Otherwise, for example, MCI might find that it had adopted an agreement that requires interconnection at points specified by, say, AT&T on dates that had already come and gone.

Second, MCI's proposal wrongly assumes that CLECs are entitled to adopt an entire interconnection agreement, irrespective of the terms in that agreement. In fact, section 252(i) is narrower in its scope. It applies only to those terms and conditions relating to (i) "any interconnection, service, or network element" (ii) that is "provided to ... any other requesting carrier."[10] As the Commission has recognized, "Congress drew a distinction between 'any interconnection, service, or network element[s] provided under an agreement,' which the statute lists individually, and agreements in their totality."[11]

Third, MCI's proposal would deny ILECs certain defenses to which they are entitled under the Commission's rules and section 252(i) itself. For example, it purports to write section 51.809(c) right out of the Commission's rules. It also would preclude an ILEC from objecting to an adoption request on the ground that the request is beyond the scope of section 252(i).

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[10] 47 U.S.C. § 252(i).

[11] *Local Competition Order* at para. 1310.

While the Commission must accordingly reject MCI's proposed declaratory ruling, and while SBC is unaware of any compelling reason to revisit the section 252(i) process, SBC would not oppose new rules or guidelines that would help achieve, in a substantively and procedurally lawful manner, uniform, streamlined section 252(i) procedures. In particular, SBC suggests that the following processes would be reasonable on a going-forward basis for in-state section 252(i) adoptions:[12]

For Uncontested Adoptions:

Step 1: CLEC simultaneously sends notice of adoption to state commission and to appropriate ILEC designee. ILEC should list name and address of person to whom the request should be made on its web site.

Step 2: Within 14 days, ILEC informs CLEC that it has no objections to the request and provides list of all legitimately related terms.

Step 3: If CLEC objects to any item on the list of related terms, the parties can negotiate or ask the state commission to hold an expedited hearing to resolve the matter.

Step 4: Within 10 days of when related terms are established, the CLEC or ILEC files an executed interconnection agreement reflecting the adoption. The filed agreement is approved expeditiously by the state commission or can be deemed approved when filed.

For Adoptions Contested Under Section 51.809(a), (b,) or (c):

Step 1: CLEC simultaneously sends notice of adoption to state commission and ILEC designee.

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[12] While the procedures described below could be used to address section 252(i) adoptions and modifications to interconnection agreements that reflect section 252(i) adoptions, the steps relating to the filing and approval of executed agreements obviously would not apply to interconnection agreement containing a mix of adopted and newly negotiated terms. For example, if a carrier seeks to adopt the interconnection provisions from a particular agreement, while negotiating its own unbundling provisions, these procedures could be used to address the adoption request, but the interconnection agreement as a whole would be subject to the section 252(e)(1) procedures established by the state.

Step 2: Within 14 days, ILEC informs CLEC that it objects to the notice and of the general basis for the objection. ILEC may object on one or more of 4 grounds: (1) the arrangement sought is not technically feasible; (2) the costs of providing the arrangement have increased since the initial adoption; (3) the reasonable period of time in which the agreement must be made available has expired; or (4) the CLEC purports to adopt terms and conditions that are not legitimately related to those governing the provision of interconnection, services for resale, or unbundled elements by the ILEC.[13]

Step 3: Within 7 days thereafter, ILEC files objections with the state commission, with service to the CLEC.

Step 4: State conducts expedited process for considering objections. In the interest of efficiency, state may also identify legitimately related terms in that process.[14]

Step 5: If state upholds ILEC objections, no further action is required. If state permits adoption of one or more of the requested terms and identifies legitimately related terms, CLEC or ILEC must file executed agreement within 10 days. State will approve that agreement expeditiously or deem it approved when filed.

These procedures could be offered as guidelines to the states, without the need for a rulemaking proceeding. Alternatively, if the Commission wishes to require the states to adopt these procedures, it could modify its rules accordingly. What the Commission may not do, though, is change its rules under the guise of a clarification or in ways that are

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[13] If an ILEC agrees to part, but not all of the request, treatment of the undisputed portion of the request will depend upon whether the disputed portion is necessary to create a complete, workable agreement. If the undisputed portion of the request can be implemented before the disputed issues are resolved (*e.g.*, the dispute relates to the availability of a particular network element and the requesting carrier is willing to initiate service without that element), the undisputed portion should be treated pursuant to the procedures described above for uncontested adoptions. Otherwise, the entire request is treated as disputed.

[14] If the state folds this issue into the hearing, obviously, the parties would have to include in their filings their respective positions as to which terms are legitimately related, assuming *arguendo* that the adoption request is legitimate.

inconsistent with the substance of section 252(i). As discussed above and in more detail below, that is exactly what MCI proposes.

II. MCI SEEKS *CHANGES* TO EXISTING RULES, NOT MERE CLARIFICATIONS THAT CAN BE MADE IN A DECLARATORY RULING.

Under the Administrative Procedure Act, administrative agencies must follow specified procedures when enacting new rules or rule changes.[15] The Commission need not follow these same procedures when it issues a declaratory ruling, but a declaratory ruling is not a vehicle by which the Commission may change its rules or establish new rules.[16] It is a vehicle by which the Commission may clarify *existing* law.

In its petition, MCI purports to seek a declaratory ruling. In fact, however, MCI asks the Commission to revise its rules and issue new rules. Indeed, existing law is inconsistent with the declaratory ruling MCI seeks in at least five respects.

First, the Commission's rules do not provide that a notice of adoption must be given immediate effect; they provide that notices must be effected "without unreasonable delay." Second, existing rules do not limit state authority to the establishment of "ministerial" filing procedures; they give states broader authority to establish section 252(i) processes, subject to the *caveat* that those processes be expedited. Third, existing rules do not (and could not) obviate the contract-based regime established by sections 251 and 252; those rules assume that the rights and obligations of the parties will be incorporated into an interconnection agreement. Fourth, existing rules do not entitle

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15 5 U.S.C. § 553.

16 *See AT&T v. FCC*, 974 F.2d 1351 (D.C. Cir. 1992) (rejecting FCC claim that it was merely "clarifying" its existing rules).

carriers to adopt entire interconnection agreements; rather, they reflect what section 252(i) says: that carriers may adopt terms and conditions relating to the provision by the ILEC of interconnection, services, or network elements. And fifth, existing rules do not limit ILECs to the three objections MCI identifies; they permit at least two other defenses to an adoption request: (1) that due to the lapse of time and other factors, the reasonable period of time in which the agreement must be available has expired; and (2) the carrier seeks to adopt terms that are not legitimately related to the availability of interconnection, services for resale, or unbundled network elements provided by the ILEC.

A. Existing Rules Do Not Provide That Notices of Adoption Take "Immediate" Effect.

The central premise of MCI's petition is that under existing federal law, a notice of adoption must be given immediate effect, irrespective of any state rules to the contrary. It does not base this claim on the language of section 252(i) itself: that provision says nothing about how quickly a requesting carrier may adopt the terms of another interconnection agreement.[17] Rather, it relies on section 51.809(a) of the Commission's rules, which, it claims, "clarifies that an ILEC must effect the adoption 'without delay.'"[18]

In so arguing, however, MCI has *altered* the text of section 51.809(a). Section 51.809(a) does not state that adoptions must be effected "without delay." It states that "[a]n incumbent LEC shall make available *without unreasonable delay* to any requesting carrier any individual interconnection, service, or network element arrangement

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[17] Section 252(i) provides: "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

[18] MCI Petition at 3. *See also* MCI Petition at 10-11, 14

contained in any agreement to which it is a party that is approved by a state commission[.]"[19]

This mis-quote by MCI is telling. If MCI believed that the phrase "without unreasonable delay" means "immediately," presumably MCI would not have felt compelled to alter that phrase again and again in its petition, as well as in its pleadings in the Ameritech complaint proceeding.[20] The reality is, though, that "without unreasonable delay" does not mean "immediately."

This point is so obvious that it seems unnecessary to support it with precedent. Nevertheless, SBC notes that federal courts addressing the issue have held that "without unreasonable delay" does not mean "immediately." In *Muldrow v. United States*, 281 F.2d 903, 906 (9th Cir. 1960), for example, the court held that "without unreasonable delay," as used in a federal rule of criminal procedure, does "not mean 'instantly,'" but instead means "as quickly as possible after certain matters . . . have been attended to." Likewise, in *United States v. Kistner*, 68 F.3d 218, 222 (8th Cir. 1995), the court found that a policy that requests for permits to distribute literature be submitted to the Park Service 10 days prior to the date needed is consistent with a federal regulation requiring permits be issued "without unreasonable delay." *See also Street v. Cherba*, 662 F.2d 1037, 1039, n.2 (4th Cir. 1981) ("'Fresh pursuit' under the Maryland Code, does 'not

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[19] 47 CFR 51.809(a).

[20] *See note 17, supra. See also, e.g.,* MCI Brief, E-99-23 at 5 (emphasis in original): "section 51.809 of the Commission's Rules requires that ILECs make available *without delay,* terms and conditions of previously-approved agreements." *And see* MCI Reply to Ameritech Answer at 3 (emphasis in original):

> MCI WorldCom has demonstrated that Ameritech's refusal to honor – *without delay* –MCI WorldCom's election to adopt interconnection agreements pursuant to section 252(i) constitutes a clear violation of section 252(i) of the 1996 Act and section 51.809 of the Commission's Rules. ... *Any* delay by an incumbent LEC, therefore, in honoring a requesting carrier's election to opt-into a previously approved interconnection agreement must be deemed an unreasonable delay.

necessarily imply *instant* pursuit, but pursuit *without unreasonable delay*'") (emphasis added).

Commission precedent likewise makes clear that "without unreasonable delay" does not mean "immediately. *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, ¶¶ 98, 104-05 (1998) (having ruled that carriers must execute verified carrier changes "without unreasonable delay," Commission declines to adopt specific deadlines based on its recognition that "there may be legitimate reasons for a delay"); *Liability of Radio Beaumont, Inc., Licensee of Radio Station KLVI, Beaumont, TEX., for Forfeiture*, Memorandum Opinion and Order, 21 F.C.C.2d 303, 305 (1970) (where Commission rule required licensee to replace tower lights "without unreasonable delay," the "question whether delay is reasonable is one of fact").

Although existing rules do not entitle CLECs to opt immediately into an interconnection simply by faxing a notice of their intent to do so, neither do they require CLECs to submit to a lengthy negotiation and approval process. SBC recognizes that a section 252(i) adoption does not require such a process and that requesting carriers must be permitted to obtain their statutory rights on an expedited basis and without unreasonable delay. To concede, however, that the process must be expedited and without unreasonably delay is not to concede – as MCI would have it – that there can be no process at all and that requesting carriers have a federal right unilaterally to adopt any previously approved interconnection agreement, effective immediately. There clearly is no such federal right.

B. The Commission's Rules Currently Permit States To Establish Procedures By Which Section 252(i) Adoptions May be Effected on an Expedited Basis.

MCI's proposed declaratory ruling is also inconsistent with the role that the Commission has accorded the states in fashioning section 252(i) procedures.[21] In the *Local Competition Order,* the Commission expressly invited the states to establish procedures governing section 252(i) adoptions:

> Since agreements shall necessarily be filed with the states pursuant to section 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis.[22]

According to MCI, the Commission thereby merely "recognized the need for state commissions to establish expedited processes by which requesting carriers may file agreements (as opposed to seek approval of those already-approved interconnection agreements) adopted pursuant to section 252(i)."[23] This interpretation makes no sense at all. Any agreement that is adopted pursuant to section 252(i) will already have been filed with the state commission. Thus there would have been no reason for the Commission to require the states to establish expedited procedures for that same agreement to be refiled by the adopting carrier. It cannot be assumed, as MCI suggests, that the Commission's intent was to require states to undertake a pointless exercise.

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[21] Many states have taken the view that an agreement incorporating a section 252(i) adoption is just a particular type of negotiated agreement. These states believe that section 252(i) simply confers certain substantive rights – just like, for example, the Commission's interconnection or unbundling rules. They would argue that the fact that a CLEC has a substantive right to incorporate certain terms into its agreements does not transform those agreements into something other than negotiated agreements, assuming no arbitration is required. This position would seem to have merit and explains why section 252(e) speaks only of negotiated and arbitrated agreements.

[22] *Local Competition Order* at para. 1321.

[23] MCI Brief at 6.

Equally important, MCI changes what the Commission actually said. The Commission did not invite states to establish procedures for the expeditious *filing* of adopted agreements. It invited states to establish procedures for *making agreements available* to requesting carriers. The only plausible reading of this language is that the Commission left it to states to establish the processes by which section 252(i) adoptions could be effected. MCI's claim that they are prohibited from doing so under current law is wrong.

The Commission, of course, may nevertheless conclude that some states have not established the types of processes the Commission envisioned. If that is the case, the Commission can provide guidance to the states as to how to fix those processes on a going-forward basis, and SBC has set forth a proposal to that end. Alternatively, the Commission could preempt a particular state's procedural rules on the ground that the procedures are not sufficiently expedited, as Commission rules require. Or the Commission could adopt new rules. What the Commission cannot do, however, is to change its rules without a rulemaking by pretending, as MCI proposes, that the Commission never invited the states to establish section 252(i) processes in the first place.

C. The *Global NAPs* Decisions Are of No Help to MCI

Citing the Commission's decision in *Global NAPs, Inc. v. Bell Atlantic –New Jersey*,[24] MCI claims further that the Commission has already held that requesting

[24] *Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, CC Docket No. 99-154, FCC 99-199, released August 3, 1999 (*Global NAPs New Jersey).*

carriers need only make a notice filing to effect a section 252(i) adoption. MCI is wrong. As an initial matter, the language MCI cites from *Global NAPs New Jersey* was mere dicta. The issue before the Commission in *Global NAPs New Jersey* – and the only issued decided – was whether the Commission should preempt the New Jersey Board of Public Utilities (the Board) pursuant to section 252(e)(5) because of the failure of the Board to resolve issues in an arbitration proceeding within the nine month time limit in section 252(b)(4)(C). The Commission neither sought nor obtained comments on the procedures that should apply to section 252(i) adoptions.[25] Indeed, the dicta MCI cites is not even part of the "Discussion" section of the order, but rather appears in a footnote in the "Background" section. It has no legal effect, and it certainly does not supercede the text of section 51.809 and the *Local Competition Order,* which, as noted, clearly permit states to establish *some* process for considering section 252(i) adoptions.

In any event, the dicta in *Global NAPs* does not lend support to MCI's proposed declaratory ruling, even it had legal significance. While the Commission did state that "a carrier should be able to notify the local exchange carrier that it is exercising [its section 252(i) rights] by submitting a letter to the local exchange carrier identifying the agreement (or the portions of an agreement) it will be using and to whom invoices, notices regarding the agreement, and other communications should be sent[,]" the Commission did not suggest that this notice must be given immediate effect. Nor did the Commission suggest that no further process is permitted. To the contrary, the Commission specifically restated its prior holding that "states may adopt 'procedures for

[25] A copy of the Public Notice in the *Global NAPs* proceeding is attached as Attachment B.

making agreements available to requesting carriers on an expedited basis.'"[26] Moreover, in elaborating on the meaning of "expedited," the Commission in no way suggested that "expedited" means "instantaneous." Rather, the Commission said "[a]n expedited process for section 252(i) opt-ins would necessarily be *substantially quicker* than the time frame for negotiation, and approval, of a new interconnection agreement since the underlying agreement has already been subject to state review under section 252(e)."[27] If the Commission had intended that the section 252(i) opt-in process be instantaneous, it would have said so. By referring to it merely as "substantially quicker than the [process] for negotiation, and approval, of a new interconnection agreement[,]" the Commission made clear that it does not envision an instantaneous process.

While the dicta in *Global NAPs New Jersey* is thus, at best, ambiguous, and, at worst, inconsistent with MCI's arguments, the decision in G*lobal NAPs Virginia*[28] is directly contrary to MCI's claims. In that order, the Common Carrier Bureau denied a request by Global NAPs for preemption of the jurisdiction of the Virginia State Corporation Commission after that Commission concluded in an arbitration that it was too late (under section 51.809(c)) for Global NAPs to adopt another carrier's interconnection agreement. The Bureau recognized that section 252(e)(5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state commission fails to act to carry out its responsibility under section

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[26] *Id.* at para. 4.

[27] *Id.* at note 14 (emphasis added).

[28] *Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198, Memorandum Opinion and Order, DA99-1552, released August 5, 1999.

252.[29] Thus, presumably if the Bureau had felt that the 1996 Act and/or Commission rules entitle requesting carriers *immediately* to adopt an interconnection agreement, the Commission would have had to preempt the Virginia Commission decision. By subjecting a section 252(i) adoption notice to arbitration, the Virginia Commission clearly would have been violating its responsibilities under section 252 to give immediate effect to such notices. As noted, though, the Bureau declined to preempt, rejecting Global NAPs' argument that the Virginia Commission failed to carry out its responsibilities under the Act.

In short, the *Global NAPs* decisions in no way support MCI's argument in this proceeding. The Commission's rules and the *Local Competition Order* govern the section 252(i) process, not dicta in the background section of an order addressing a completely different issue – particularly dicta that is, at best, ambiguous, if not flatly contrary to MCI's position. Indeed, to the extent the *Global NAPs* cases are relevant at all, it is the *Global NAPs Virginia* decision that matters, because the Bureau's decision not to preempt cannot be reconciled with MCI's claim that federal law precludes states from reviewing section 252(i) adoptions.

D. A Section 252(i) Adoption Requires the Execution of a Signed Agreement Reflecting That Adoption

A fourth fallacy in MCI's proposed declaratory ruling is its failure to recognize that the regime Congress established in section 251/252 is a contract-based regime, and that an adoption, therefore, is not effected until the incumbent LEC and requesting carrier

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[29] *Id.*, para. 16.

memorialize that adoption in a signed agreement.[30] The access and interconnection rights under section 251 are not self-executing;[31] rather they derive from interconnection agreements adopted pursuant to sections 251 and 252.[32] These agreements are the prescribed vehicle by which CLECs may take advantage of the 1996 Act's access and interconnection requirements. It may seem elementary to say it, but this contract-centered framework for local telephone competition contemplates and requires that the obligations and rights of incumbent LECs and their competitors be set forth in a contract.

The arbitration process provides an apt analogy. When a state issues an arbitration decision, the substantive rights and obligations of the parties are decided. That is not the end of the matter, however. The arbitration decision must be incorporated into an interconnection agreement that is executed – and thereby binds – the parties. That is the regime envisioned by the Act, and it is the practice, SBC believes, in each of the fifty states and the District of Columbia.

The same procedure applies to section 252(i) adoptions. While section 252(i) may confer certain substantive rights, a section 252(i) adoption is not effected – any more so than an arbitration decision is effected – until a contract memorializing the adoption is executed. Indeed, the Commission has recognized that this is how the section 252(i) process ought to work. It stated in the *Local Competition Order* that "parties may utilize any individual interconnection, service, or network element in publicly filed

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[30] *See* MCI Petition at note 31 ("ILEC claims ...that new agreements must be executed before an adopted agreement can be deemed effective are unsubstantiated.")

[31] In this respect, this regime is different from the tariff regime established in sections 201-205 of the Communications Act of 1934.

[32] *See Goldwasser v. Ameritech,* 1998 WL 60878 (N.D. Ill. 1998) (The duties under sections 251 and 252 exist "only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition.")

interconnection agreements *and incorporate it into the terms of their interconnection agreement.*"[33]

The Commission's observation comports, of course, with basic contract law. It is black letter law that an agreement "is nothing more than a manifestation of *mutual assent* by two or more legally competent persons to one another."[34] Since the sending of a notice of adoption is a unilateral action, not a manifestation of mutual assent, it is not a substitute for an agreement.[35]

Not only must there be a contract, but the contract must be in writing. By law in every state in the SBC region (and elsewhere in the country as well), a contract that is not to be performed within one year after it is made is void unless it is in writing.[36] Though

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[33] *Local Competition Order* at para. 1316 (emphasis added).

[34] WILLISTON ON CONTRACTS (Fourth Edition), Volume 2 Supplement, § 1.3 (emphasis added), *quoting* Restatement (Second) of Contracts § 3 (1979); Restatement of Contracts § 3 (1932).

[35] WILLISTON, *supra* at s 6.1 ("[a]cceptance of an offer is necessary to create a simple contract, since it takes two to make a bargain.

[36] *See, e.g.,* Illinois: 740 ILCS 80/1 ("No action shall be brought . . . upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith . . . .").

Indiana: IC 32-2-1-1 ("No action shall be brought . . . upon any agreement that is not to be performed within one (1) year from the making thereof . . . [u]nless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith . . . .").

Michigan: M.C.L.A. 566.132 ("In the following cases an agreement, contract, or promise is void unless that agreement, contract or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature of the party to be charges . . . .").

Ohio: O.R.C. § 1335.05 ("No action shall be brought . . . upon an agreement that is not to be performed within one year of the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith . . . .").

Wisconsin: W.S.A. 241.02(1) ("In the following case ever agreement shall be void unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing and

there may be instances in which an agreement resulting from a section 252(i) adoption will expire within one year after the adoption, such instances are rare, because (a) virtually all approved interconnection agreements have a term longer than one year, and (b) virtually all adoptions are from agreements that have more than one year left to run. Accordingly, interconnection agreements, including those resulting from section 252(i) adoptions, must be in writing or they will in almost every instance be unenforceable.

While it is thus evident, as a matter of law, that *some* written instrument reflecting a section 252(i) adoption must be executed before that adoption takes effect, public policy counsels that this instrument ought to be an interconnection agreement that sets forth all of the terms and conditions governing the parties' relationship. Consider an example: MCI informs Ameritech Illinois by letter that it wants to adopt the resale provisions of the Ameritech Illinois/USXchange agreement; the unbundling provisions of the Ameritech Illinois/AT&T agreement; and the interconnection provisions from the Ameritech Illinois/Focal agreement. Ameritech then informs MCI by letter that it has no objection. If the parties leave it at that, and do not execute an actual interconnection agreement, they cannot possibly know what all the terms and conditions governing their relationship are. For example, will three different sets of dispute resolution provisions apply (one from each underlying agreement), depending on the subject matter of the dispute? The parties are begging for chaos if they do not set forth *their* agreement in writing.

Moreover, a signed interconnection agreement may be necessary, not only to stitch together the pieces of underlying agreements that the requesting carrier adopts, but also to fill the gaps that those pieces do not cover. Section 252(i) does not entitle carriers to adopt an entire interconnection agreement; they are limited to terms and conditions

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subscribed by the party charged therewith: (a) Every agreement that by its terms is not to be performed within one year from the making thereof.").

governing interconnections, services and network elements provided by the incumbent LEC. Consequently, even a carrier that seeks to adopt all such provisions in an agreement may need to negotiate or avail itself of tariff provisions governing other matters, including, but not limited to, the applicable reciprocal compensation rate (*e.g.* tandem or end office), number portability arrangements, dialing parity, access to rights of way, access to directory listings, etc. A signed interconnection agreement is necessary so that all of the rights and obligations of the parties are memorialized.

Indeed, even if the Commission decides – incorrectly – that a requesting carrier may adopt an entire interconnection agreement, the reality is that carriers almost never would. There are almost always *some* changes that must be made to the underlying agreement in order to perfect the adoption. Those changes may simply involve new notice provisions or points and dates of interconnection, or they may involve other provisions. Either way, the best way to ensure orderly business practices and to minimize confusion and disputes is to require that section 252(i) adoptions be reflected in an interconnection agreement.[37]

Certainly, no credible claim could be made that a requirement that agreements be executed is inconsistent with the purposes of section 252(i). As the Commission has recognized, the primary purpose of section 252(i) is to prevent discrimination. It operates, in the words of the Commission, by enabling smaller carriers who lack bargaining power to obtain favorable terms and conditions that may have been negotiated by others, such as the large interexchange carriers.[38] That provision was in no way

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[37] MCI suggests, not only, that carriers may adopt entire interconnection agreements, but that conforming changes to accommodate those agreements to the new party and new arrangements are not necessary. Notwithstanding MCI's claim, a contract is a binding legal document, not some vague articulation of rights and obligations that might or might not apply. MCI's novel view of the nature and legal effect of a contract departs from the most basic principles of contract law. It is not a way to do business, and it is certainly not federally sanctioned.

[38] *Local Competition Order* at paras. 1313-1315.

intended to displace the need for carriers to incorporate the terms and conditions under which they provide and receive service into signed interconnection agreements.

Finally, it would be foolish, indeed, for the Commission to suggest that an adoption must by law take effect *before* an interconnection agreement is executed. If the execution itself is truly just a ministerial act, then the execution process will not materially delay the section 252(i) adoption, and the Commission can establish rules or guidelines, such as those proposed here by SBC, to ensure against this. On the other hand, if significant issues remain unresolved, the parties do not have an interconnection agreement and cannot be required to implement an agreement that does not exist.

E. CLECs May Adopt Terms And Conditions Under Which An ILEC Provides Interconnection, Services, Or Unbundled Elements. It Has No Right Under Section 252(i) To Adopt Other Provisions, Including Reciprocal Compensation Provisions, In An Interconnection Agreement.

Still another flaw in MCI's petition is that it assumes that CLECs may adopt, upon notice, an entire interconnection agreement. That is not the case, however. Section 252(i) does not say anything about adopting *agreements*. What it says is:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Nor do this Commission's rules implementing section 252(i) say anything about adopting *agreements*. Rather, the Commission's rules confirm that requesting carriers may adopt individual interconnection, service, and network element arrangements.[39]

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[39] *See* 47 U.S.C. § 51.809(a). In some states, due to state decisions or otherwise, SBC has permitted carriers to adopt entire interconnection agreements. Although any ILEC is, of course, free to permit carriers to adopt entire agreements, SBC does not believe that, as a matter of law, section 252(i) entitles requesting carriers to do so.

As MCI is quick to point out, incumbent LECs challenged this pick-and-choose interpretation of section 252(i), and contended that the Act required the adoption of entire agreements, rather than of interconnections, services or network elements. ILECs ultimately lost that battle though, and MCI won. Consequently, the law is now clear: Section 252(i) entitles requesting carriers to adopt interconnections, services and network elements, not entire agreements.

1. CLECs May Not Adopt The Reciprocal Compensation Provisions of Another Agreement

Because section 252(i) applies by its terms to interconnection, services, and network elements provided by the incumbent LEC, that provision does not extend to the reciprocal compensation provisions of an interconnection agreement. Reciprocal compensation is paid for the transport and termination of local traffic. Transport and termination, though, is not interconnection; it is not a service as that term is used in section 252(i); and it is not a network element.

In its petition and, more fully, in the Ameritech complaint proceeding, MCI claims otherwise. It argues that transport and termination is either a service for purposes of section 252(i) or a term or condition of interconnection.[40] In fact, it is neither. Although the 1996 Act offers little in the way of explicit guidance on what the term "services" means in section 252(i), the only reasonable interpretation of that term is services provided for resale. That is because in specifying which provisions of an agreement are subject to adoption, Congress was referencing the three overarching duties of section 251(c), as reflected in sections 251(c)(2-4): the obligation to provide

[40] MCI Petition at note 31. *See also* MCI Reply to Ameritech Answer, E- 99-23 at ¶ 10.